

IN THE
MISSOURI SUPREME COURT

DARIUS NICHOLSON,)	
)	
Appellant,)	
)	
v.)	No. SC86143
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI
THIRTY-SECOND JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE JOHN W. GRIMM, JUDGE AT TRIAL
THE HONORABLE JOHN P. HEISSERER,
JUDGE AT POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE REPLY BRIEF

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STATUTES

Section 476.410, RSMo 20004, 5, 6, 8, 9

RULES¹

Rule 29.154, 5, 6, 7, 8, 9, 10

Rule 51.104, 5, 6, 8, 9

¹ Rule references are to the Missouri Supreme Court Rules of Criminal Procedure and Rules of Civil Procedure unless otherwise noted.

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the jurisdictional statement from his opening brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the statement of facts from his opening brief.

REPLY POINT RELIED ON

I. Appellant's filing of his *pro se* motion for post-conviction relief under Rule 29.15 in the Circuit Court of the City of St. Louis did not deprive the sentencing court, the Circuit Court of Cape Girardeau County, of jurisdiction over his post-conviction motion. Applying § 476.410, RSMo and Rule 51.10 to post-conviction movants does not extend the time limits of Rule 29.15; rather, it ensures that post-conviction motions filed in the circuit courts of this state within the time limitations of the rule will be reviewed on their merits, regardless of whether initially filed in the sentencing court or if received there upon transfer from another circuit court.

Plant v. Hayes, 568 S.W.2d 585 (Mo.App. K.C.Dist. 1978);

State ex rel. Director of Revenue v. Gaertner, 32 S.W.3d 564 (Mo.banc 2000);

Rules 29.15 and 51.10; and

§ 476.410, RSMo 2000.

REPLY ARGUMENT

I. Appellant’s filing of his *pro se* motion for post-conviction relief under Rule 29.15 in the Circuit Court of the City of St. Louis did not deprive the sentencing court, the Circuit Court of Cape Girardeau County, of jurisdiction over his post-conviction motion. Applying § 476.410, RSMo and Rule 51.10 to post-conviction movants does not extend the time limits of Rule 29.15; rather, it ensures that post-conviction motions filed in the circuit courts of this state within the time limitations of the rule will be reviewed on their merits, regardless of whether initially filed in the sentencing court or if received there upon transfer from another circuit court.

Contrary to Respondent’s assertions, nothing in Rule 29.15 would deprive the sentencing court of jurisdiction over a post-conviction motion erroneously filed in the improper circuit court within the time limits of Rule 29.15 and transferred by the circuit clerk of the improper court to the circuit clerk of the sentencing court.

Rule 29.15(a), which describes the “nature of” the post-conviction remedy, provides:

(a) Nature of Remedy--Rules of Civil Procedure

Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of

ineffective assistance of trial and appellate counsel,
that the court imposing the sentence was without
jurisdiction to do so, or that the sentence imposed was
in excess of the maximum sentence authorized by law
may seek relief in the sentencing court pursuant to the
provisions of this Rule 29.15. This Rule 29.15
provides the exclusive procedure by which such person
may seek relief in the sentencing court for the claims
enumerated. The procedure to be followed for motions
filed pursuant to this Rule 29.15 is governed by the
rules of civil procedure insofar as applicable.

(Emphasis added). Nothing in Rule 29.15(a) states that the motion must be *filed* in the sentencing court, rather it clarifies that the sentencing court is the court that with jurisdiction to review the post-conviction claims. *Id.* This section also notes that motions filed “pursuant to this Rule 29.15” are to be governed by the rules of civil procedure, which, as explained in Appellant’s Substitute Brief at 11-27, if applied to Appellant’s facts would permit his *pro se* motion for post-conviction relief filed in the wrong circuit, but transferred to the circuit which sentenced him (the “sentencing court”) to be treated as though originally filed in the proper court. § 476.410, RSMo and Rule 51.10.

Likewise, Rule 29.15(b), the provision which discusses the “form of motion” and the “time to file” does not give any direction regarding in what court

the motion must be filed. Specifically, the rule notes that the motion must be “substantially in the form of Criminal Procedure Form No. 40,” and that “[f]ailure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.” *Id.* Significantly, 29.15(b) does not provide that “failure to file a motion *in the sentencing court* within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed.” Thus, the language of this provision which has been determined to apply a jurisdictional limit on the post-conviction movant’s right to proceed does not specify that failure to file the motion in the sentencing court is a jurisdictional bar to relief, only that failure to file the motion within the time permitted by the rule will bar relief.

Rule 29.15(c) states that the movant “shall file the motion and two copies thereof with the clerk of the trial court” and that “[u]pon receipt of the motion, the clerk shall notify the sentencing judge.” While it uses the mandatory language “shall” it does not add the jurisdictional waiver language found in Rule 29.15(b) regarding the timeliness of the filing. In addition, the choice of the term “trial court” as the location in which the motion must be filed is more ambiguous than the term “sentencing court” used in Rule 29.15(a). That the term “trial court” could be construed by a *pro se* litigant to mean “any circuit court” opposed to “the court that imposed sentence” is plausible.

Respondent argues that treating Appellant's *pro se* Rule 29.15 motion filed in the improper circuit as timely filed would circumvent the reasonable time limitations of the rule and would render the time limits arbitrary. Respondent's Substitute Brief at 24-25. However, this argument ignores that § 476.410, RSMo and Rule 51.10 would allow only a motion filed in a circuit court *within* the time limitations to be reviewed by the sentencing court; it would not change the fact that a motion filed *outside* the time limitations of the rule, in the proper court or any other court, would be deemed untimely filed and that the sentencing court would be deprived of jurisdiction to consider such a motion.

The sole case cited by Respondent as support for his claim that the requirement that the motion be filed in the sentencing court is jurisdictional, *Plant v. Hayes*, 568 S.W.2d 585, 585-86 (Mo.App. K.C.Dist. 1978) is inapposite. Respondent's Substitute Brief at 22-23. In *Plant*, the appellate court concluded that the court reviewing the plaintiff's petitions for declaratory judgment attacking his sentences, the Circuit Court of Cole County, was without jurisdiction because the plaintiff had been sentenced in the City of St. Louis and in St. Charles County. The appellate court in *Plant* noted in *dicta* that "a court, which did not impose the sentence, is without jurisdiction in the matter [collaterally attacking the plaintiff's criminal sentences]," and determined that the Circuit Court of Cole County lacked jurisdiction to enter its order declaring that the plaintiff's sentences run consecutively. *Id.* at 587. The timeliness of Plant's motions was not an issue before the court. *Id.*

Here, Appellant is not arguing that the Circuit Court of the City of St. Louis had jurisdiction to decide the *merits* of his Rule 29.15 motion. However, under § 476.410, RSMo, the Circuit Court of the City of St. Louis did have “limited jurisdiction . . . to transfer any case filed in an improper venue to any circuit court otherwise designated by the legislature to hear the particular matter.” *State ex rel. Director of Revenue v. Gaertner*, 32 S.W.3d 564, 567-68 (Mo.banc 2000). Once transferred, under Rule 51.10, the Circuit Court of Cape Girardeau County was required to treat and determine his motion “as if it had originated in the receiving court,” i.e., as though it were timely filed.

Furthermore, Respondent’s suggestion that litigants will purposely file their *pro se* post-conviction motions in the improper court out of convenience and “bog down” those courts with litigation, Respondent’s Substitute Brief at 24, is without merit. *Pro se* post-conviction movants are incarcerated and dependant on filing their motions by mailing them via the United States Postal Service; to ensure their motions make it through the prison mail system and are promptly mailed and timely filed they need to send their motions several days, if not weeks, ahead of time and could be assured no advantage by mailing their motions to a closer court. The application of § 476.410, RSMo and Rule 51.10 to post-conviction movants filing *pro se* motions will not create any greater burden on the court than it experiences for other civil cases.

For the foregoing reasons, the motion court’s conclusion that Nicholson’s Rule 29.15 motion was untimely filed is clearly erroneous, Respondent’s argument

must fail and this Court must reverse the motion court's dismissal of Appellant's *pro se* motion.

CONCLUSION

WHEREFORE, for the foregoing reasons, appellant requests that this Court reverse the judgment of the motion court dismissing his Rule 29.15 motion for post-conviction relief as untimely filed and remand this cause for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this day, November 5, 2004, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, 1530 Rax Ct., Jefferson City, Missouri 65109. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 7,750 words, 550 lines, or twenty-five pages. The word-processing software identified that this brief contains 1,590 words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee Anti-Virus software and found virus-free.

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APPENDIX

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Rule 29.15A1-A3

29.15. Conviction After Trial--Correction

(a) Nature of Remedy--Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.

If:

- (1) An appeal of such judgment or sentence is taken;
- (2) The appellate court remands the case resulting in entry of a new judgment or sentence; and
- (3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

- (1) The date the person is delivered to the custody of the department of corrections; or
- (2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

(c) Clerk's Duties. Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to the counsel who is appointed to represent the movant.

(d) Contents of Motion. The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) Pro Se Motion--Appointment of Counsel--Amended Motion, Required When. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) Withdrawal of Counsel. For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) Amended Motion--Form, Time for Filing--Response by Prosecutor. Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) Hearing Not Required, When. If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) Findings and Conclusions--Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) Appeal--Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(l) Successive Motions. The circuit court shall not entertain successive motions.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence is pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.